No. 588

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

ELECTRIC VACUUM CLEANER COMPANY, INC.; INTERNATIONAL MOLDERS' UNION OF NORTH AMERICA, LOCAL 430; PATTERN MAKERS' ASSOCIATION OF CLEVELAND AND VICINITY; INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 54; METAL POLISHERS' INTERNATIONAL UNION, LOCAL NO. 3; AND FEDERAL LABOR UNION NO. 18,907, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR UNION RESPONDENTS.

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
Counsel,
736 Bowen Building,
Washington, D. C.

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Opinions Below.

The opinion of the Circuit Court of Appeals (R. 867-875) is reported in 120 F. (2d) 611. The findings of fact, conclusions of law, and order of the Board (R. 150-217) are reported in 18 N. L. R. B. 591.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on June 6, 1941 (R. 866). The petition for a writ of certiorari was filed on September 6, 1941, and was granted on October 20, 1941. The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10(e) of the National Labor Relations Act.

Statement of Facts.

The Statement of Facts contained in the Board's brief is inadequate in several respects. In so far as possible, relevant facts there stated will not be repeated in the following general statement.

In March of 1935, the Mechanics Educational Society, an independent labor organization representing a considerable number of employees of the Electric Vacuum Cleaner Company, one of the respondents herein, called a strike at the plant for the purpose of obtaining an increase in wages and a betterment in working conditions. The strike lasted for ten weeks, during which time the plant remained closed and the business of the employer was greatly disrupted. While the strike was in progress, representatives of the M. E. S. contacted various organizations affiliated with the American Federation of Labor for the purpose of obtaining assistance from the American Federation of Labor in the strike effort. Assistance was promised and rendered, and the strikers affiliated with the various A. F. of L. organizations, respondents herein (R. 159). By June of 1935, 610 of the 801 employees then employed became dues-paying members of the various A. F. of L. affiliates (R. 160).

In an effort to terminate the strike, the American Federation of Labor presented a contract to the Company calling for increases in wages and other favorable conditions,

which contract had been approved by a vote of the membership. By the end of June the Company finally agreed to the contract, but only after having been presented with proof of the overwhelming A. F. of L. majority.[1] The employees returned to work completely satisfied with what had been obtained under the contract (R. 160).

The contract was partly written and partly oral, the oral portion referring to the obligation of the employees to become or remain members of the Union.[2] There is a considerable difference of opinion concerning the scope of the oral agreement. The contracting parties state that under the oral agreement all new employees were to become members of the Union, and all employees who were members at the time of the contract were to remain members during the term of the contract, but that old employees who never were members of the Union were not obliged to become members. This version seemingly was upheld by the court below. The Board maintains that the oral contract required merely that newly hired employees were to become members of the Union. The evidence respecting these two versions will be discussed in a later portion of this brief. It is undisputed, however, that the contract granted the A. F. of L. affiliates exclusive recognition and exclusive bargaining rights for a period of one year, and that the contract was perfectly valid when made.

In addition, the 610 employees who were members of the Union at the time the contract was entered into had then signed individual authorization cards giving full power of attorney to the American Federation of Labor to represent such employees in all matters respecting

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[1] It should be noted that this was prior to the passage of the Wagner Act.

[2] Why this portion of the contract was not in writing does not appear in the record. The fact that the employer was a member of a Cleveland trade association opposed to closed-shop agreements might offer some explanation.

wages, hours and working conditions for a period of one year. The power of attorney could be revoked only after a thirty-day notice in writing. These powers of attorney had been presented to the employer for examination as proof of the A. F. of L. majority when the contract was negotiated. A copy of the power of attorney is set forth below.[3]

Production was resumed following the signing of the contract, the Company announcing publicly to its employees that the Company would maintain a peaceful and friendly relationship with the Union, and that any attempt to disturb such peaceful and friendly relationship would be considered as contrary to the best interests of the Company and would be punishable by discharge (R. 291). Operations

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[3] AUTHORIZATION FOR REPRESENTATION.

I, the undersigned, employee of the Electric Vacuum Cleaner Co. employed as Assembler hereby authorize my .....
.....(craft-Mechanic, Helper or Apprentice)
Craft Organization, affiliated with the American Federation of Labor,

	Membership Fee
Metal Polishers International Union	$3.50
International Association of Machinists	3.75 and $5.00
International Molders Union of N. A.	3.00 and 5.00
Pattern Makers Association	5.00 and 7.00
Federal Labor Union	2.50

to represent me and, in my behalf, to negotiate and conclude all agreements as to hours of labor, wages and other employment conditions. I also authorize the Company to deduct, within thirty days, from wages due, the prevailing initiation or reinstatement fee of the organization as indicated hereon and transmit same to the authorized representative of the organization.

The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me, and shall remain in full force and effect for one year from date and thereafter, subject to thirty (30) days' written notice of my desire to withdraw such power and authority to act for me in the matters referred to herein.

Signature of employee.
(Union label)

continued without interruption until March of 1937.[4] All grievances and disputes were promptly settled under the contracts and the relationship between the employer and the employees was at all times completely harmonious (R. 285, 724).

In March of 1937, at a time when both the contract and the individual powers of attorney had five months to run, the C. I. O. United Electrical Workers commenced an organizing campaign in the plant. The C. I. O. activities were centered in the machine shop employing about 150 employees (R. 281), where it claimed to have enrolled 60 employees into membership (R. 170). With the advent of the C. I. O. at the plant, the difficulties which were the subject of the Labor Board case took place. The American Federation of Labor, as the exclusive representative of the employees both under the contract and the powers of attorney, took steps to protect its contract against the C. I. O.'s raid, and to maintain normal production as agreed upon. These steps, as set forth in the Board's decision (R. 150), consisted of soliciting 12 machine shop employees to become members of the American Federation of Labor with employer assistance; requesting the discharge of one machine shop employee for refusal to join; and requesting the employer to shut down the plant for a period of ten days. This request followed a sit-down strike staged by the C. I. O. in the machine shop—a strike in direct violation of the existing contract (R. 849) and resulting in considerable disruption and violence. During the period that the plant

[4] The 1935 contract had been renewed in July of 1936 for a period of one year, and the renewal contract was ratified by a vote of the full membership. At the time of this renewal, the American Federation of Labor again presented the company with evidence of its membership, such evidence consisting of newly signed powers of attorney as described above. 771 of the 809 employees employed in July, 1936, had signed such powers of attorney which were binding until July of 1937. No employee at any time revoked or attempted to revoke any such power of attorney.

was shut down, the A. F. of L. affiliates, in an effort to maintain harmonious relationships under its existing contracts, negotiated a supplemental contract with the Company requiring all employees of the Company to become members. This supplemental contract was entered into on April 3, 1937,[5] and the plant was opened and normal production was resumed the next day. All employees were offered employment and the Union offered to accept all employees into membership regardless of their participation in the sit-down strike or their C. I. O. activities. Some 24 machine shop employees who refused to join the American Federation of Labor and to obtain clearance cards were refused employment upon the request of the A. F. of L. under the terms of the supplemental contract. Of these 24, 16 were former members of the A. F. of L., 5 were new employees who had not become members, and 3 never were members (R. 197, et seq.).

Upon complaint filed by the C. I. O. in May of 1937, and after hearings and the issuing of a previous decision which was withdrawn on the Board's own motion after an appeal had been filed in the Circuit Court, resulting in a delay of many months (R. 154), the Board, on December 21, 1939, issued a second decision in which it found the employer guilty of unfair labor practices in permitting and participating in the foregoing activities of the A. F. of L. representatives. The Board held that the Company had thereby afforded illegal assistance to the American Federation of Labor. It ordered the Company to reinstate the discharged employees and to abrogate its May, 1937, contract with the American Federation of Labor, the closed-shop provisions immediately, and the entire contract at any time another organization was certified. It made no finding that the A. F. of L. did not represent an uncoerced majority of the Company's employees either previous to or at

[5] This contract was formally set up in writing and signed on May 20, 1937.

the time of the making of the May or April contract, stating merely that, because some assistance was given, the contract was illegal. The Board considered it immaterial that the alleged acts of assistance took place during an admittedly valid contract which called either for exclusive recognition or maintenance of membership and during the terms of individual powers of attorney conferring exclusive bargaining rights upon the Union.

Preliminary Discussion.

The foregoing undisputed facts indicate quite clearly that all of the employer's difficulties with the Labor Board are the direct result of an attempt by the C. I. O. to raid a plant which had already been organized and which was operating harmoniously under a collective bargaining contract completely satisfactory to the employees covered by it. This practice of raiding has been strongly condemned by the President of the United States (See New York Times (June 14, 1941)). Indeed, it is hardly open to debate that for any labor organization thus deliberately to seek to disrupt an entirely harmonious relationship, particularly by resort to the sit-down strike, during the term of a beneficial and satisfactory labor agreement is an entirely reprehensible practice. Certainly, no one (the Board has not) would assert that the acts of the A. F. of L. affiliates, acquiesced in by the employer, had no moral or ethical justification—that a similar reaction to attempts to raid its membership and to disrupt its employer relationship could not be expected of any other labor organization which had achieved a highly beneficial bargaining contract after a long and costly strike, particularly when 95% of all the employees in the plant were dues-paying members of the organization, and that an employer would not similarly respond. But the Board says that it is not concerned with the science or philosophy of union ethics—it is concerned with an Act in which Congress has declared certain activi-

ties to be unlawful regardless of their moral justification. It may be true that we are concerned with an Act in which Congress has, for certain specific reasons, outlawed certain practices, and that we are bound by the Act and by the intent of Congress thereunder. That Act, however, has for its fundamental purpose and ultimate objective the establishment of peaceful industrial relationships through the media of mutually agreeable collective bargaining contracts, and the practices which it has outlawed are practices which prevent or interfere with the attainment of that objective—not every practice regardless of the circumstance under which it occurred. The Board has held in this case, however, that the Act forbids attempts to withstand such raiding tactics if it involves the giving of any assistance, even though the "assistance" was rendered at the request of an exclusive bargaining representative during the terms of valid individual and collective contracts. It would seem anomalous that the same Act which fosters collective bargaining relationships should outlaw attempts to maintain by peaceful means an harmonious contractual relationship freely entered into. The Circuit Court of Appeals for the Sixth Circuit, in a unanimous opinion, has held that the Act does not present that anomaly; that the activities of the employer, engaged in at the request of the exclusive representative, were justified under the law.

Summary of Arguments.

Respondents advanced four theories before the court below, under which the Board's order must be set aside. Three of these were in effect sustained and the fourth was not passed upon. Respondents advance these same four arguments here:

1. The first argument asserts that the Board's findings and conclusions respecting the scope and intent of the oral

contract are not supported by the evidence, and that the evidence clearly indicates that the scope and intent of the oral contract was to require all employees who were members of the Union at the time of the contract to remain members, as well as all new employees to become members.

2. The second argument can assume the correctness of the Board's conclusions as to the scope of the oral contract. It is contended that nevertheless the employer was justified in engaging in the so-called acts of interference, and that the "assistance" was valid under the Act. Such "assistance" was valid for the reason that it was rendered at the request of an exclusive bargaining representative during the existence of a valid exclusive bargaining contract and valid individual powers of attorney signed by 95% of the Company's employees, and because such "assistance" was rendered in an effort to maintain the stable and harmonious relationship agreed upon and to withstand the C. I. O. raid.

It can be demonstrated by the Legislative history of the Act and by a regard for its ultimate purposes that Congress did not intend that the right of employees to complete freedom of choice as to representative was to be as unqualified before the execution of a valid collective bargaining contract and before the execution of valid individual powers of attorney as subsequent thereto. The necessity for achieving a stability in industrial relations, through the execution of binding collective agreements; the fact that Congress, under Section 9, gave an exclusive representative extremely broad and unqualified rights to negotiate in respect to all matters affecting employment; and the fact that Congress permitted the closed shop, all indicate that Congress did not and would not have intended that the rights of employees to freedom from interference or freedom in choice was at all times completely unqualified. Congress is

concerned in seeing to it that collective bargaining agents are freely chosen to begin with; once that preliminary objective has been realized and a freely selected bargaining representative is in existence, the right to freedom from interference as to choice necessarily must be limited under certain circumstances if the ultimate purpose of the Act—stability in industrial relations through mutually satisfactory collective bargaining relationships—is to be achieved.

3. The third argument asserts that, since the A. F. of L. was insured of representing a majority during the terms of the individual powers of attorney, and since those powers of attorney were in full force and effect at the time of the April and May closed-shop contracts, the A. F. of L. necessarily then represented a valid majority and could lawfully enter into a closed-shop contract. Whatever acts of assistance the employer rendered would be completely immaterial because the A. F. of L.'s majority was at all times guaranteed and nothing that the employer could do could operate either to assist the A. F. of L. or to destroy the individual commitments that the Union had secured.

4. The fourth argument can assume as correct all the Board's findings of fact and most of its conclusions of law, i.e., it can assume both that the oral contract required only new employees to become members and that all of the various acts of "assistance" were illegal and unjustified under the Act. The Board found it immaterial and unnecessary to make a finding that the A. F. of L. did not represent an uncoerced majority at the time of the April or May full closed-shop contracts. (The Board, in effect, admits an uncoerced majority at that time and, in fact, could not validly make a finding of a coerced majority because of the existence of the unrevoked, freely entered into powers of attorney.) Since the A. F. of L. then did

represent an uncoerced majority, and a majority which had neither been obtained nor maintained by any acts of "assistance", the A. F. of L. and the Company had a right to enter into the closed-shop contract under Section 8(3) of the Act, and the discharges under such contract were valid. The Board's theory that *any* assistance whatsoever, regardless of the effect on the majority, incapacitates a labor organization from entering into a closed-shop contract is incorrect and contrary to the provisions and purposes of the Act.

The court below did not pass upon this argument.

This fourth argument will be discussed first because, if adopted, it will be unnecessary to inquire into the extent and validity of the various acts of assistance, and will afford complete support for the decision of the court below, in so far as such decision set aside the order of the Board abrogating the closed-shop contract and ordering the reinstatement of the 24 employees discharged thereunder.

ARGUMENT.

I.

A labor organization in fact representing an uncoerced majority is not incapacitated from entering into a closed-shop contract because of prior employer assistance not affecting such majority.

Section 8(3) of the Act reads as follows:

> "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or pre-

scribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made."

Section 9(a) of the Act provides that:

"Representatives designated or selected for the purposes of collective bargaining by the *majority* of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

The Board takes the position that under the proviso clause in Section 8(3) of the Act *any* act of assistance on the part of the employer, regardless of its effect on the majority, is sufficient to render illegal a closed-shop contract, or to incapacitate a labor organization receiving such assistance from entering into such contract, even though the employees comprising the majority were entirely unaffected in their choice as to a collective bargaining agent. In other other words, the Board insists that under the literal language of Section 8(3) if 999 out of 1000 employees (or, as in this case, 771 out of 809) joined an organization of their own free choice and desired to enter into a closed-shop contract through their representative with an employer to protect their membership, and the one thousandth employee was told (or, as in this case, some of the 38 were told) by the Company to join the organization, thereby *assisting* the organization, a closed-shop contract consummated with that representative would be invalid and the desires of the uncoerced majority frustrated.

Respondent Unions assert that a labor organization is barred from entering into a closed-shop contract only if it did not then represent an uncoerced majority—*i. e.*, only if the "assistance" operated to obtain or maintain the necessary majority.

The Board, in conformity with its position (see Board's brief, pp. 29-38), has found it unnecessary and irrelevant in the present case to make any finding as to whether the admittedly valid majority of the American Federation of Labor was maintained by the so-called assistance or whether the American Federation of Labor *did not represent an uncoerced majority at the time of the April 3rd or May 20th contracts.*[6] The Board made no finding that the American Federation of Labor did not represent an uncoerced majority at the time it entered into the April, 1937, closed-shop contract.

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[6] See Board's decision (R. 195) where it specifically found it unnecessary to determine whether the A. F. of L. majority had been maintained:

> "The contention that the A. F. of L. affiliates must be presumed to have represented a majority of the respondent's employees on April 3rd, is obviously beside the point. Section 8(3) of the Act precludes the execution of a closed shop with a labor organization established, maintained or assisted by unfair labor practices, irrespective of whether it has or has not been designated as collective bargaining agent by a majority of the employees. Accordingly, it is unnecessary to determine whether, in the absence of the respondent's unfair labor practices, the A. F. of L. affiliates would be presumed to have continued to be, on April 3, the bargaining agent designated by a majority of the respondent's employees."

See further its decision (R. 196) where the Board specifically held that the fact of whether the A. F. of L. represented a valid majority of its employees at the time of either the April 3rd or May 20th agreement was entirely irrelevant:

> "But what we have said with respect to the agreement of April 3rd, 1937, is entirely applicable to the contract of May 20, 1937. In the intervening period the respondent had merely continued its unfair labor practices under the guise of performance of a closed-shop agreement which had no validity. Manifestly under such circumstances the *majority* of the A. F. of L. affiliates and the purported referendum are *irrelevant.*" (Italics supplied.)

A. *The Board's Strictly Literal Construction of the Proviso Clause of Section 8(3) Is Not Permissible*

In order to sustain its position, the Board is obliged to adopt a strictly literal interpretation of the 8(3) proviso clause; it is obliged to isolate the language set forth in parentheses from the context of the proviso and from the general purposes and objectives broadly and unmistakably set forth in other provisions of the Act.

Even under a strictly literal construction of the proviso, the Board meets difficulty, for the language relied on by the Board is inserted parenthetically only, indicating that it must be a concomitant of, rather than co-extensive to, the fundamental requirement of a valid majority, and the word "assisted" must be taken as referring only to a majority obtained or maintained by such assistance, the labor organization which "is the representative of the employees as provided in Section 9(c)" being, of course, the *majority representative.*

The Board's literal method of interpretation, however, is not permissible. It is a cardinal rule of statutory construction that the intent, not the letter, of a statute constitutes the law, and that statutes are not to be so literally construed as to defeat their very purpose. Where precise words, if considered in their ordinary or literal sense, would lead to injustice or to an unreasonable or absurd result, or to a result contrary to or inconsistent with the purpose of the legislation, then the intent of the law must prevail over its letter. See *United States* v. *American Trucking Associations,* 310 U. S. 534, 84 L. Ed. 1345, and cases cited therein, where this Court said:

> "In the interpretation of statutes the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their

meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. *Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.* When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' The interpretation of the meaning of statutes, as applied to justificable controversies, is exclusively a judicial function." (Emphasis supplied.)

B. *Congress Intended to Confer Full Bargaining Rights Concerning All Matters Affecting Employment on a Union Representing an Uncoerced Majority*

Bearing these principles in mind and turning to the Act itself, what is the intent of Congress with respect to the capacity of labor organizations to enter into collective bargaining agreements? Is there anything in the Act or in the Congressional Reports or even Debates which indicated that Congress intended the extreme limitation contended for by the Board on the making of closed-shop contracts?

The general and broad intent of Congress is expressed in no uncertain terms in Section 9(a) of the Act. That section unambiguously and unconditionally states that representatives *"selected by the majority"* shall be the exclu-

sive representatives for collective bargaining in respect to "rates of pay, wages, hours of employment *or other conditions of employment.*" Obviously, as the Board points out in its brief (p. 33), such majority must be an uncoerced majority, or the Act would be meaningless—but nevertheless, a freely chosen majority is the sole prerequisite set forth in Section 9, and once that free majority exists it is to be accorded the complete and exclusive privilege of bargaining concerning *all matters* affecting employment, including the right to negotiate "conditions of employment." "Conditions of employment" would, of course, refer to and include the obligation to become or remain a union member under a closed-shop contract, union membership being a condition of employment.

The Board does not argue that the rendering of some assistance to an organization wishing to enter into an exclusive recognition, as distinguished from a closed-shop contract, which assistance, however, does not affect the majority or does not operate to create a coerced majority, would incapacitate that majority from entering into an exclusive bargaining contract under Section 9(a); in fact, that it can do so is inferentially affirmed in its brief (p. 32), and the Board in many cases has gone into the question of whether a labor organization asserting an exclusive contract as a bar to a representation investigation did in fact represent an uncoerced majority of the employees. (See Third Annual Report, p. 134.)

It is difficult to see where and how the Board can draw a distinction between the capacity to enter into an exclusive contract and the capacity to enter into a closed-shop contract. Section 9(a), as we have seen, unconditionally confers the rights upon a majority representative to negotiate concerning all conditions of employment, which would include membership obligations. If any greater limitation on the making of closed-shop contracts than on the making

of exclusive recognition contracts was intended by Congress, it certainly would have been set forth in Section 9(a). The Board can suggest no reason of policy which would require a stricter limitation on the ability of a labor organization to negotiate closed-shop contracts than to negotiate contracts concerning the very important matter of wages and hours. There is no reasonable distinction between the two classes of contracts, for certainly the matter of wages and hours is as vital to employees as is the matter of union membership, and in both cases the necessity for freedom from coercion is equally important.

If Congress had any such distinction in mind, and if Congress did intend to prescribe a greater degree of protection in the making of one type of contract than in the making of the other, a discussion of that distinction should appear in the Congressional Debates or in the Congressional Reports. Such discussion, however, is conspicuously absent from both the Debates and the Reports. All that the Reports do show is that Congress intended to confer the broadest possible rights to negotiate contracts upon a valid uncoerced majority. (See p. 13 Senate Report No. 573, 74th Congress, 1st Session.) The section of the Senate and House Reports cited by the Board in its brief (p. 33) obviously relates solely to the question of whether the Act *compels* closed-shop contracts, and the language quoted was obviously intended solely to put at ease those who feared such result. Certainly, neither this section nor any other section of the Reports that the Board might cite is a definitive exposition of the principle either that the recipience of any assistance shall incapacitate a labor organization otherwise representing an uncoerced majority from entering into a closed-shop contract, or that the right to enter into closed-shop contracts shall be more narrowly limited than the right to enter into other agreements respecting wages and hours.

C. Respondents' Contention Is Consistent With Purposes of Act; Board's Contention Is Not, And Its Contract Abrogation Remedy Is Punitive.

The construction contended for by the union—that an uncoerced majority is free to enter into closed-shop contracts—is an entirely reasonable one, is entirely consistent with the purpose of the Act to foster collective bargaining relationships where majority groups have duly selected bargaining agents, and furthermore, does not remove or limit any protection to which employees are entitled under the Act.

Where some assistance has been given, but an uncoerced majority still exists, it is the right of that group to enter into a closed-shop contract if it so wishes in spite of such "assistance"; otherwise the majority rule would have no meaning and majority wishes might never be made effective. This is not to say that those minority employees, whose free choice has been affected, have no right to protection from such interference. Of course, they have, but this the Board can afford (if the "assistance" was illegal, which, of course, as far as the present case is concerned, we deny in fact and are assuming only for the purpose of this argument) by requiring the employer to cease and desist from such interfering practices, by the posting of appropriate notices, and by reinstating such employees who might have been discriminated against. To take the further step and, in addition, to abrogate the contract which has been entered into by a free and uncoerced majority, would not serve to remedy or abate the effect of the interference in the slightest, but would, on the contrary, be entirely punitive and would neglect completely the fundamental purposes of the Act. It would be punitive because when, as here, there is no contention that the "assistance" operated to *maintain* a majority, or that the majority existing at the time of the contracts was a coerced majority, no possible remedial

result could be obtained by abrogating the contracts. The only effect of abrogating that contract would be to punish the employees, the labor organization and the employer. The contract entered into under such circumstances is not the result of such "assistance"—it is the result of the act of an admittedly free majority—and there is no reason why such uncoerced majority should be deprived of the benefits and stability of relationship it may hope for under such contract.

In *Consolidated Edison Co.* v. *National Labor Relations Board*, 59 S. Ct. 206, this Court struck down as punitive a similar attempt by the Board to abrogate a collective bargaining contract where the contract, as in the present case, was not, itself, the consequence of unfair practices. This Court stated:

> "Here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective."
>
> . . . . . .
>
> "The employers' practices which were complained of, could be stopped without imperilling the interests of those who for all that appears had exercised freely their right of choice.'"

D. *Board's Position Is Unsound As A Practical Proposition.*

The preposterous effects of holding that a legitimate labor organization representing an entirely free and uncoerced majority of employees is precluded or incapacitated from entering into a closed-shop contract the instant that organization is the recipient of any "assistance" on the

part of the employer, regardless of what little effect such "assistance" may have on the free choice of the majority of the employees, well illustrates the weakness of the Board's contention.

"Assistance" can consist of any act defined as an unfair practice. It may, therefore, amount to nothing more than a word of praise for a particular organization offered by a person occupying a position of authority less than that of a "straw boss", as, for instance, a "lead man" in a tool and die room. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72. This "assistance" could be unsolicited, unwanted, or even unknown to the recipient organization, but it would serve to incapacitate that organization from making closed-shop contracts and would render such contracts illegal. The employer would have it well within its power effectively to interfere with the organizing activities of its employees by deliberately affording some preference. The Board's construction of the proviso would put into the employer's hands the very opportunities for interference which it is the purpose of the Act to prevent. And the proposed "remedy" would invalidate contracts which it was the purpose of the Act to foster.

E. *The Board's Argument Based on Difficulty of Ascertaining Majority Coercion Is Unsound.*

In support of its contention that Congress must have intended that any act of assistance was sufficient to incapacitate a labor organization from entering into a closed-shop contract, regardless of the effect on the majority, the Board seems to rely heavily on the argument that, as a practical proposition, it would be difficult for the Board to determine in each instance whether the choice of a majority was affected by acts of assistance, and that it could not very well inquire into the subjective responses of individual em-

ployees to an employer's acts of interference. This argument is entirely without merit and it is difficult to believe that the Board is not advancing it speciously, for the following two reasons:

1. As a practical proposition, the Board knows full well that it has complete ability to weigh and appraise overt acts of interference on the part of employers to determine whether the employer's conduct has a coercive effect on a majority, and that it can do this without inquiring into subjective responses of the individual employees. See *Texas & New Orleans R. R.* v. *Brotherhood*, 281 U. S. 548, where this Court said in respect to the use of the word "influence" in the Railway Labor Act:

> "The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purposes of this act than in relation to well-known applications of the law with respect to fraud, duress and undue influence."

The Board has made such appraisals and continues to make such appraisals in hundreds of cases. On the principle that it need not make subjective inquiries but can appraise the evidence as a whole and objectively judge its effect upon the employees, it has denied (and rightfully so) offers of employers' attorneys to place individual employees upon the stand to prove that they were not intimidated or coerced by certain conduct that the Board alleges is in violation of the Act. In fact, in every case (and there are hundreds of them, including the *Machinists'* case, 311 U. S. 72, here relied on by the Board [7]) in which it has made a specific finding that a certain labor organization does not represent an uncoerced majority, the Board has made

[7] See Third Annual Report, p. 134, and Fifth Annual Report, p. 55.

the very adjudication which it claims in its present brief it is impossible to make, thereby conclusively evidencing that the "practical difficulties" are somewhat less than "insur nountable".

2. We have seen that the requirement of complete lack of assistance, regardless of effect on the majority, applies only to the making of closed-shop contracts as distinguished from exclusive recognition contracts. However, it obviously would be equally difficult for the Board to determine the majority status in both classes of cases. If then, as the Board argues, Congress intended to relieve the Board of this obligation because of the supposed difficulty, why was it not equally considerate in prescribing the conditions prerequisite to the making of a non-closed-shop contract? The fact that Congress made no differentiation is answer both to the contention that the purpose of the proviso was to relieve the Board of the obligation, and to the contention that there is a distinction between the two classes of cases.

F. *Machinists' Case Is Easily Differentiated.*

The Board relies on the decision of this Court in *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72. The *Machinists'* case is entirely distinguishable; in fact, it affords support for respondents' arguments. In the *Machinists'* case this Court was presented with the contention by the Machinists' Union that the Board had erroneously failed to make a finding that its majority had been maintained by unfair practices, and that, therefore, the Board had erred in invalidating a closed-shop contract entered into by such majority. This Court answered that argument by stating that it was unnecessary for the Board to have made a finding on the issue of whether the Machinists' majority had been maintained by assistance,

because of the fact that the Board had made a specific finding that the Machinists did not in fact represent an uncoerced majority at the time that the contract was entered into. The court stated in this connection as follows:

> "* * * And the finding of the Board that petitioner did not represent an uncoerced majority of toolroom employees when the closed-shop contract was executed is adequate to support the conclusion that the *maintenance* as well as the *acquisition* of the alleged *majority* was contaminated by the employer's aid." (Emphasis supplied.)

In the present case the Board made no finding that the American Federation of Labor did not represent an uncoerced majority at the time the April contract was entered into; that is the distinction between the *Machinists'* case and the present one.

Further, it is to be noted that this Court speaks of the "maintenance" and the "acquisition" of a *majority.* This is greatly significant; for if this Court had considered that *any* act of assistance, regardless of its effect in obtaining or maintaining a majority, was sufficient to incapacitate the Machinists' organization from entering into a closed-shop contract, it would have been entirely unnecessary to have used the quoted language or to have referred to a majority at all. Further indication that this Court considered the effect of assistance on a *majority* status as material (which it would not be if the Board's position were correct) is seen in the statement by the Court at the beginning of the *Machinists* decision that,

> "* * * The main contested issue here is narrowly confined. It is whether or not the employer 'assisted' the petitioner in enrolling its *majority.*" (Emphasis supplied.)

G. *It Is Not Possible To Assume or Infer A Coerced Majority.*

It might be argued by the Board that the evidence in the present case is sufficient to support an assumption, and hence a conclusion, that the assistance affected the majority, or that the April majority was a coerced one. However, it is not possible merely to assume or infer, broadly, or from general evidence, that the A. F. of L.'s majority was a coerced one or had been maintained by acts of assistance; even assuming the "assistance" in the present case was illegal, the issue of the effect of such assistance on the majority status must be adjudicated and the fact of majority coercion proven.

This is particularly true in the present case where the allegedly illegal activities affected only a small number of employees,[8] and there is a complete lack of evidence of any history of C. I. O. hostility on the part of the employer, such as existed in the Machinists' case.

Under the circumstances of this case it cannot be lightly assumed, without the taking of specific evidence and proof, that the majority did not desire to maintain its membership in the A. F. of L., or that the limited solicitation operated to maintain such majority, and that such majority would

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[8] The Board claims the shutdown requested by the A. F. of L. as exclusive bargaining agent, and insisted upon under threat of strike, constituted a lockout and was also an unfair practice. This shutdown occurred after the foregoing acts, was prompted by the disruption caused by the C. I. O. sit-down strike, and was a matter agreed upon between the plant organization with which, at the very least, it had exclusive bargaining relationships and exclusive authority to deal for all the employees. Such an agreement was obviously a valid one, regardless of the purpose, if the A. F. of L. represented an uncoerced majority at the time of such agreement or was the duly authorized collective bargaining agent. Consequently, the shutdown would be at worst in the same class as the April 3rd agreement, both being valid if the A. F. of L. represented an uncoerced and unmaintained majority.

not have existed but for such practices. The Board raised no such issue in its complaint, the issue was not adjudicated at the hearings, and no testimony was directed to the point of whether the A. F. of L. majority was or was not maintained, or whether the A. F. of L. was not in fact the representative of an uncoerced majority at the time of the April 3rd agreement, and finally, no finding on that point was made.[9]

Consolidated Edison Co. v. *National Labor Relations Board*, 59 Sup. Ct. 206, is conclusive on the point. There this Court stated:

> "Apart from this, the main contention of the Board is that the contracts were the fruit of the unfair labor practices of the employers; that they were 'simply a device to consummate and perpetuate' the companies' illegal conduct and constituted its culmination. *But, as we have said, this conclusion is entirely too broad to be sustained. If the Board intended to make that charge, it should have amended its complaint accordingly, given notice to the Brotherhood, and introduced proof to sustain the charge. Instead it is left as a matter of mere conjecture to what extent membership in the Brotherhood was induced by any illegal conduct on the part of the employers.* The Brotherhood was entitled to form its locals and their organization was not assailed. The Brotherhood and its locals were entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights

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[9] The courts cannot supply missing findings of fact. It is for the administrative tribunal, and not the courts, to make all necessary factual determinations. *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 Fed. (2d) 681, at 689. Further, there is a presumption that a majority once validly obtained continues until specific evidence to the contrary is introduced. This is all the more true when a collective bargaining relationship under such majority has been achieved. See *National Labor Relations Board* v. *Piqua Munising Wood Products Co.*, 109 Fed. (2d) 552.

which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge an extravagant and unwarranted assumption. The employers' practices which were complained of, could be stopped without imperilling the interests of those who for all that appears had exercised freely their right of choice." (Emphasis supplied.)

Perhaps the foregoing discussion concerning the necessity for adjudicating the question of whether in fact there existed a coerced majority is entirely unnecessary in the present case, for the reason that even if the case were remanded for a hearing on that issue the Board would find it impossible to make a finding that the choice of the majority of the employees was not a free one as of the time the April or May closed-shop contracts were entered into. This is true not only because of the comparatively minor nature of the employer's "assisting" activities, but, in addition, because of a much more insuperable obstacle—namely, that 771 of the 809 employees had signed individual commitments authorizing the American Federation of Labor to represent such employees exclusively for all purposes of collective bargaining for the term of the commitments. These powers of attorney were freely entered into and had not been revoked. They were binding upon the employees and gave the American Federation of Labor full bargaining rights during their terms. Thus, it would be impossible for the Board to find that the A. F. of L. did not represent a free majority on April 3rd. This portion of the argument is discussed further under Argument IV, at p. 47, *infra*.

II.

The evidence, particularly in view of the circumstantial evidence, is insufficient to support the Board's finding as to the limited scope of the oral contract. The oral contract made immaterial the "assistance" and, in any event, validated 21 of the 24 discharges.

Under the foregoing Argument I we can assume that the acts of assistance (the solicitation, etc.) were illegal. The following three Arguments, II, III and IV, assert that the alleged acts of assistance were permissible and justifiable under the Act, or were immaterial.

The first of these Arguments deals with the scope of the oral agreement prescribing membership obligations. Briefly, it is this: The oral agreement provided for almost a complete closed shop (maintenance of membership of 771 out of 809 employees, plus obligation of new employees to become members) and not, as the Board concluded, for a mere preferential shop with only new employees obligated to become members. Accordingly, during the term of the contract the Union would have the right to require those employees who the Board found had been unlawfully solicited to remain or become members, and would have the further right to require their discharge for failure to join, as the Union did require at a later date. If these discharges are considered to have taken place under the April contract, that contract (or the successor May contract) was valid, because at the time of its making the A. F. of L. was assured of a 95% majority, and no other group had made a majority claim. In any event, 21 of the 24 refusals to employ would be lawful since only 3 of the 24 employees did not come under the terms of the oral contract respecting membership requirements, these three being old employees who never had been members of the Union (R. 197).

The Board does not deny that its decision and order would not be justified if the oral agreement did provide as the parties thereto contend.[10] The evidence respecting the intent of the parties under the oral contract is set forth in the brief of the Company and need not be repeated here. It is sufficient to note that that evidence is entirely insufficient to support the Board's conclusions. Careful study of the testimony (which admittedly is not very clear) reveals that the parties must have intended to require the members who were then members to remain members, and that the parties intended that only those old employees who never were members should not be required to become members. (See R. 698, 811, 812, 264, 265, 291 and 750.) In view of the indefinite nature of the testimony, the circumstantial evidence should be given considerable weight, and the circumstantial evidence unmistakably indicates that the parties intended that the employees who were members at the time the contract was signed were to remain members.

In the first place, the Company had made no objection whatever to the Union's demand that existing members were to remain members, but had insisted merely that it would not require employees who never were members to join the Union (R. 750, 811). Obviously, the Union would only give up as much of its demand for a full closed shop as it had to; it certainly would not gratuitously forego

[10] The Board contends, of course, that the oral agreement was "secret", and that it had been abandoned when the April closed-shop contract was entered into. The Act imposes no obligation to publicly post a valid agreement after it has been entered into with knowledge and approval of duly selected union representatives—in this case representatives representing many crafts and departments. In any event the Company's public announcement, immediately following the contract, certainly put the employees on notice that interference with the contractual relationships would not be permitted. With respect to the alleged abandonment, clearly the parties intended merely to supplement the former contract so as better to counteract the disruption caused by the C. I. O. raid.

a requirement as to membership to which the Company has made absolutely no objection. The Board's conclusion respecting the scope of the membership requirement finally agreed upon is quite unrealistic to say the least.

Further circumstantial evidence that the oral contract was a virtual closed-shop contract is seen in the announcement made by the Company immediately after the contract was entered into to the effect that employees disrupting the contract relationship would be subject to discharge. This announcement was made long before the advent of the C. I. O., and there would have been no reason for making it unless prompted or supported by a virtual closed-shop oral agreement as contended by respondents.

It is submitted that the evidence, both direct and circumstantial, supports the conclusion of the court below that,

> "The Board, therefore, erred as to its order finding the respondent guilty of discrimination with reference to 18 of the 24 employees named in the order because these 18 were members of A. F. of L. affiliates, were bound by the contract until June 1937, *and were compelled to be in good union standing in order to continue in respondent's employ.*"

and that the evidence is entirely insufficient to support the Board's conclusions.

III.

Whatever employer assistance was rendered the Union at its request was justified under the Act; the right of employees to freedom from employer interference necessarily cannot be as completely unqualified after a valid collective contract has been freely entered into as prior thereto if industrial stability is to be achieved.

Under the third theory presented to the court below the various acts of assistance constitute justifiable interference because of the circumstances under which such assistance

was rendered. Briefly, the argument is this: All of the acts of assistance took place during the existence of an admittedly valid, exclusive bargaining contract (to accept the Board's limited interpretation of the agreement) and during the terms of 771 admittedly valid individual powers of attorney conferring full and exclusive bargaining rights upon the American Federation of Labor, as part of an effort to maintain the industrial peace and stability that had been bargained for under such contract. Accordingly, the acts of assistance, allegedly invalid because interfering with free choice, were permissible; the Act protects liberty to choose but not liberty to change during terms of valid collective contracts and individual commitments, and necessarily contemplates some interference as justifiable under such circumstances. Further, any interference with the rights of any individual employee occurred solely at the behest of the representative to whom the employee had duly delegated all bargaining rights and was, therefore, further justified.

All employer activity that interferes with the employees' rights is not illegal interference in violation of Section 8(1) of the Act, just as all discrimination is not illegal discrimination in violation of Section 8(3) of the Act; the existence of a closed shop would justify discrimination otherwise illegal, and similarly, the existence of certain circumstances, such as are present in the instant case, necessarily must render a certain measure of interference justifiable if the ultimate purposes of the Act are to be realized and industrial stability achieved.

We are here concerned with a very broad question: Once the ultimate objective of the Act has been achieved and a lawful and mutually satisfactory contract has been executed through a freely chosen representative, which contract is strengthened by individual commitments, is any policy of the Act effectuated by preventing peaceful cooperation by

an employer at the request of the exclusive bargaining representative for the purpose of maintaining the contract for its duration? Is the right to freedom from employer interference an absolute one, as unqualified after as well as before the making of a valid contract, or is not that right one necessarily subordinate to the ultimate objective of the Act—the making of mutually agreeable contracts and the maintenance of peaceful relationships thereunder—and to limitations thereon imposed by the voluntary act of the employees themselves—in the present case by both collective and individual agreements? The answer of the Board (as formerly constituted but not the present Board, as we shall see) is that the Act guarantees full liberty to choose and full freedom from employer interference, and that these rights are at all times unqualified. The former Board insisted that Section 8(1) of the Act must be literally and rigidly applied, seemingly regardless of whether the ultimate purpose of the Act might thereby be defeated.

A. *The Ultimate Purpose of The Act Is To Achieve Industrial Stability Through Free Contractual Relationships, And the Right to Freedom From Interference Is Incidental to That End.*

No one will deny that the attainment of stable collective bargaining relationships through negotiations between bona fide and freely chosen representatives of the employees and the employer is the fundamental objective of the Act. The declaration of policy states quite plainly that:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organi-

zation, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

The Senate Report also indicates that the underlying scheme of the Act was to stabilize industrial relationships by giving legal status to the process of collective bargaining, and that right to freedom from interference was given as a means to that end:

> "But many of the most fertile sources of industrial discontent can be segregated into a single category susceptible to legislative treatment. Competent students of industrial relations have estimated that at least 25 percent of all strikes have sprung from failure to recognize and utilize the theory and practices of collective bargaining, *under which are subsumed* the rights of employees to organize freely and to deal with employers through representatives of their own choosing." (Emphasis supplied.)
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> . . . . . .
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> "It is thus believed feasible to remove the provocation to a large proportion of the bitterest industrial outbreaks by giving definite legal status to the procedure of collective bargaining and by setting up machinery to facilitate it." (Senate Report No. 573, 74th Congress, p. 2.)

The substantive rights set forth in Section 7 of the Act and the restrictions set forth in Section 8 of the Act are directed to one purpose—that of protecting the right to organize and freely to choose representatives, *to the end* that employees may engage in collective bargaining. The right to freedom of choice obviously is given to permit free selection of a representative *so that* bargaining can be properly and fairly carried on by an organization chosen by

the employees themselves and not one foisted on them by their employer and subservient to its rather than their wishes. Accordingly, Section 7 and Section 8 grant and protect *initial* rights—rights *incidental* to the practice of collective bargaining. The Senate Report (p. 8) states this quite clearly:

> "*Sections 7 and 8. Rights of employees—Unfair labor practices.*—These sections are designed to establish and protect the basic rights *incidental to the practice of collective bargaining.*" (Emphasis supplied.)

B. Employees' Rights to Freedom From Interference Necessarily Must Be Qualified Following Valid Agreements If the Purposes of the Act Are To Be Realized.

Once a representative has been freely chosen, and once mutually satisfactory agreements have been entered into for specified and reasonable periods, the preliminary right freely to choose and join necessarily must be circumscribed if stability in industrial relationships is to be achieved and collective bargaining rendered workable. A construction of the Act which, on the pretext of protecting the right of free choice, permits employees to change their choice of representatives at will during the life of a valid collective bargaining contract and during the terms of valid individual commitments would utterly disregard, if not pervert, the ultimate purpose of the Act by rendering farcical the process of collective bargaining. This right of free choice must be considered subordinate to the basic purpose of the Act to achieve stability and industrial peace through collective bargaining agreements. The employer, as well as the bargaining representative with which it must deal, has a legitimate interest in seeking definiteness and stability in its contractual relationships. If collective bargaining contracts are to be at all effective, obligations there-

under cannot be repudiated at the whim of the employees. As stated in the Senate Report:

> "The object of collective bargaining is the making of agreements that will *stabilize* business conditions and fix fair standards of working conditions." (Senate Report No. 573, 74th Congress, p. 13.)

The Board itself has repeatedly recognized that the right to freedom of choice necessarily must be limited not only after a collective agreement has been made but even after an exclusive representative has been chosen. If Section 7 were to be interpreted literally, employees clearly would have a right to change their bargaining representative at any time that they desired. However, in the interest of stability, the Board has adopted a policy of refusing to permit a change of bargaining representative within a year after a representative has been selected. (See Fifth Annual Report, p. 55.) And the Board, of course, has consistently refused to permit a change of bargaining representative during the term of an existing contract, even though that contract may be for more than a year. In *Owens-Illinois Pacific Coast Company*, 36 N.L.R.B. No. 204 (November 15, 1941), the Board declined to disturb a two-year contract even though more than a year had passed. In upholding the plea that "if the terms of these contracts are disregarded, it will encourage raids by rival labor organizations and result in unstabilized industrial conditions and jeopardize National Defense," the Board stated as follows:

> "In view of these cicumstances we believe that the Board in furtherance of the purposes of the Act to attain stabilized labor relations in industry through collective agreements should not proceed to an investigation and certification of representatives during the term of the closed-shop contracts between the company and the C.B.B.A. Locals 141 and 140."

Former Chairman Madden expressed the following opinion in the case of *Ansley Radio Corporation and Local 1221, United Electric and Radio Workers, (C.I.O.)*, 18 N.L.R.B. No. 108:

> "In my opinion, to hold that a closed shop *or other collective agreement* may be disrupted at any time that a majority of the employees in the unit determines upon another bargaining representative would open the door wide to that very instability and uncertainty in labor relations which the Act is designed to remove." (Emphasis supplied.)

The following two decisions involving the problem of contract disruption, while of courts of lesser jurisdiction, are nevertheless quite applicable and their reasoning hardly answerable:

> "The agreement has legal sanctions even if the bargaining agent was not approved by the National Labor Relations Board after selection by the workers. The fact that it was entered by unanimous concurrence of the employees is unquestioned. It was binding upon plaintiff when entered. It should be held binding today. But mutuality and reciprocity of obligation are essentials of contractual relations. The agreement when first entered was not only obligatory upon the Local 25-31, an American Federation unit, but upon each individual member thereof * * * Plaintiff also had a contractual and a property right herein * * * Plaintiff had the right to have the employees either remain in good standing in the union, an affiliate of the American Federation of Labor, or to permit the discharge of any who did not do so without difficulty. It had contracted for industrial peace for a year so far as these men and this union were concerned on the basis of the facts disclosed in the record and the plaintiff should not have all the rights and be subject to all the liabilities of the contract."
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> (*M. & M. Woodworking Co.* v. *Plywood & Veneer Workers' Local No. 102*, 23 Fed. Supp. 11 (U. S. D. C. Oregon).)

"Labor costs are in many industries the largest item entering into the cost of production, and if American manufacturers are to be able to compete in world markets, they must know with reasonable certainty what their labor costs will be over a reasonable period in the future. Certainly one year is not an unreasonable period during which employees may bind themselves to a fixed compensation and to definite working conditions. Indeed, it is highly to the interest of all working men that they should be able to look forward to definite employment on known conditions for some time in the future. To hold that any contract between the proprietor of a business and his employees, acting through a committee or a union, can be abrogated at any time at the will of a majority of the workers, in our judgment would not only be unsound but absurd. Exceptions dismissed."

(*Pennsylvania Labor Relations Board* v. *Red Star Shoe Co.*, 1 Labor Cases 668 C. C. H. (Penn. Ct. of Common Pleas:))

See also *M. & M. Woodworking Co.* v. *National Labor Relations Board*, 191 Fed. (2d) 938; *Peninsula & Occidental Steamship Co.* v. *National Labor Relations Board*, 98 Fed. (2d) 411 (C. C. A. 5th).

In those cases the courts have affirmed the philosophy that the purpose of the National Labor Relations Act is to obtain collective bargaining agreements for definite periods, and that employees who have designated their choice of bargaining agent, and who through these agents have entered into contractual relationships with their employers, may not disregard their obligations at will.

In the recent case of *Triboro Coach Corporation* v. *New York State Labor Relations Board*, decided July 29, 1941, 286 N. Y. 314, 36 N. E. (2d) 315, the highest court of New York held as follows on a question similar to that involved in the present case:

"Since the contract of November 14, 1939, was a contract made by the employer with a labor organization

which is 'the representative of employees as provided in section seven hundred five' (Sec. 704), it follows that this contract, which was ratified in a properly noticed meeting held by Amalgamated, by the vote of 128 employees (which constituted a majority of the 240 Triboro employees who were affected thereby) is a valid and binding contract. Since the enactment of the State Labor Relations Act (Labor Law, art. 20; Cons. Laws, ch. 31), the right of the employer to contract with the representatives selected by the employees is not in doubt (Sec. 707, subd. 5). In order for such contracts to be of any effect to carry out the policy of the act to establish industrial peace (Sec. 700), such contracts must be binding on both parties."

* * * * * * * * *

"The decisions of the Special Term and the Appellate Division are in keeping with the policy of the act as set forth in Section 700. Thus where the bargaining power between employers and employees has been equalized through the powers of the Board, the recognition of the sanctity of contracts made between the parties would seem more likely to remove sources of industrial strife and unrest. Industrial peace is promoted by collective agreements obtained for employees through the medium of their *bona fide* labor organizations or other proper representatives. When such an agreement has been obtained, and a stable relationship established thereby, the very purpose of the act may be defeated if the machinery of the Board be employed to upset such contractual relationship."

The 1941 Report of the Secretary of Labor (p. 10) contains the following illuminating and very applicable statement:

"There is another ancient deeprooted American belief. It is the belief in the sanctity of contracts, and when a trade-union signs a collective agreement with an employer, the public expects that the letter and spirit of such a contract will be observed by both parties,

even though it turns out to be a poor bargain for one or the other, *and this expectation includes the loyalty and good faith of private members, their sense of unity in accepting the decisions of elected officers or a majority of members.*" (Emphasis is supplied.)

The Board decision in the instant case was rendered in 1939. Since then a different set of members have come into office. The Board as presently constituted has adopted a construction of the Act directly contrary to that of its predecessor. In a group of decisions handed down in August, 1941, the Board upheld the principle that an employee's right to freedom from employer interference is not the same after as it was before the making of a mutually satisfactory collective contract by a freely chosen representative. In *International Envelope Corporation*, 34 N. L. R. B. No. 122, the Board stated:

> "The Union was not only the statutory representative of the discharged employees by virtue of Section 9(a) of the Act, but they had themselves designated it as their representative by becoming members. When the Union was unable to effectuate their desires, the discharged employees decided to take matters into their own hands. The Union, as the authorized representative of all the employees, disapproved of the action of the minority group by twice at regular meetings declining to support complaints of the discharged men and by intervening in behalf of the respondent in the present case. *Under such circumstances, when a dissident minority group takes action contrary to the terms of an existing contract and contrary to the wishes of the duly designated representative chosen by the majority, disciplinary action by the employer and by the Union is clearly justified. To rule otherwise would be to permit self-appointed dissenting groups within a union to ignore or to defy the legally designated representative, to take matters into their own hands, to destroy the collective agreements negotiated by majority organizations, and to undermine the process of collective bargaining itself.*" (Emphasis supplied.)

See also *Weirton Coal Co.*, 34 N. L. R. B. No. 121, and *Motor Products Corporation*, 34 N. L. R. B. No. 120.

C. *The Broad Grant Under Section 9(a) of The Act Would Be Rendered Meaningless if Employees' Freedom of Choice is Unlimited.*

Further indication that Congress did not intend the right o freedom of choice to be completely unqualified after a ona fide representative has been freely chosen by a majority and a contract has been agreed upon is seen in the broad ights granted an exclusive representative under Section (a) of the Act. We have already seen that that section ives a freely chosen majority collective bargaining representative absolute and unconditional rights to negotiate oncerning *all matters* affecting employment. Section 9 ould indeed be devoid of meaning and would indeed conr empty privileges were the prerogatives it bestows upon duly designated exclusive representative held to be subect to the whim of every individual employee who, having reely chosen and contracted, desires to change his mind.

D. *The Fact That "Assistance" Was Rendered At The equest of A Duly Authorized Exclusive Employee Representative Is of Great Significance.*

This brings us to another important consideration—the ct that all acts of claimed interference were instituted at e request of a duly authorized representative. The fact at all of the acts of assistance were rendered by mutual greement following the request of the freely selected, exusive bargaining agent necessarily eliminates all objecons from employees that their rights under the Act are ing interfered with, for that interference results not from e exercise of the untrammelled will of the employer, but om the specific request of their duly elected bargaining

agent. The Act is concerned with interference that is employer-initiated and which has for its purpose the prevention of collective bargaining relationships; the Act is not concerned with interference which is employee initiated by agreement between a bona fide exclusive representative and the employer, and which has for its purpose the preservation of existing collective bargaining relationships. There is a palpable difference between direct, self-initiated interference by an employer and interference resulting from a request on the part of the duly designated collective bargaining representative—a request motivated by the natural and legitimate right of that representative to maintain its status as such representative and to fulfill its contractual promises; a request that is honored by the employer not only because of its inherent reasonableness but also out of his desire to protect his business against disruptions that would ensue from the activities of individuals who see fit to repudiate their own promises and the activities of their own freely chosen representative.

Employees, by freely choosing an agent in the first instance as their exclusive representative, have conferred upon such representative great powers to negotiate concerning matters vitally affecting their lives and well-being. If it is within the power of their representative to negotiate concerning as important a matter as wages, why is it not equally within its power to negotiate concerning other matters affecting employment or, in particular, to negotiate concerning means and ends (not involving discharge or similar discrimination as distinguished from interference) of maintaining a stable relationship under an existing contract? Certainly, the broad grant under Section 9(a) indicates no intent to limit that right. Employees are free to change their representative at the expiration of the contract if they do not like what that representative is doing. The powers residing in that exclusive bargaining agent renders

it vitally necessary that that agent be freely chosen in the first instance, but thereafter the enjoyment of the rights termed by the Senate Report as "incidental" rights obviously must be qualified if the purposes of the Act are to be realized. The employees' remedy for abuse of the power lodged in the exclusive representative is either to elect union officials more favorable to their views or else to designate a new representative at the end of the contract period.

Another consideration affecting the question of "interference", but which has been overlooked by the Board, is the existence of the individual commitments or powers of attorney. The right to choose other representatives, assuming any such right did exist after entering into the exclusive recognition contract, had been voluntarily relinquished under the individual commitments; while the powers of attorney remained in effect, the 771 employees who had signed them certainly could not claim their freedom to choose had been interfered with. This right was not curtailed or abridged by any act of the employer acting on its own volition, but by the employees' own voluntary commitments. As stated by the court below:

> "If the one-year term limits the freedom of the employees at will to discard membership in one union for membership in another, the limitation has been freely agreed to by the men themselves, and the right of organization with representatives of their own choosing is curtailed not by the employer, but by their own valid agreement."

E. *The Respondents' Contentions Would Not Confer Closed-Shop Rights Upon Mere Exclusive Representative, As Argued By Board.*

Neither the foregoing argument, nor the argument under paragraph B, *supra* (p. —), is tantamount to saying, as the Board argues (Brief, pp. 24-26), that every bargaining

agent would acquire under an exclusive recognition contract the same rights that exist under a closed-shop contract; nor can it be said in opposition to such arguments that thereunder the proviso clause of Section 8(3) would be superfluous or meaningless, or that the Congressional intent, as manifested in its Reports, to permit no discrimination as to hire, except under a closed-shop contract, would be disregarded.

One obivous difference between a discharge in the absence of a closed-shop contract, but made under the circumstances of this case (assuming there had been a discharge in the present case prior to the April contract, which, of course, is not the fact), and an outright discharge in the absence of a closed-shop contract, is that in the former case the discharge has been made with the consent and at the request of an exclusive representative for the purpose of preserving contractual relationships, while in the latter case the discharge would be the act of the employer alone, exercising his untrammelled will for the purpose of union disruption. Further, a discharge under the circumstances of this case would not be tantamount to imposing a closed shop condition upon the employees, for, under a closed shop, the employer would have been *obliged* to discharge upon request of the union, while in the present case the employer would *not* have been so obliged, and the discharge would have to be one *mutually agreed* upon.

However, we need not in this case be concerned with the question of discharges or other violations of Section 8(3) of the Act for the reason that the respondent unions do not contend that, in the absence of a closed-shop contract, they, as exclusive representatives and under the circumstances of this case, would be entitled to ask the employer to discharge an employee or commit any other act which is in violation of Section 8(3) of the Act, and that the employer could comply with such request with impunity. The question of discrimination in violation of 8(3) is not involved

in this case in connection with any of the employer's acts prior to April 3, 1937. The Board has not charged or found any violation of 8(3) prior to the making of the April, 1937, agreement, the Board's findings as to the 8(3) violations referring solely to the employees discharged under the April agreement (R. 211). The Board did not charge or find that any of the so-called "acts of assistance" which the Board claims incapacitated the union from entering into the April agreement constituted a violation of 8(3).[11] The refusals to employ under the April agreement would not, of course, constitute a violation of Section 8(3) if the contract was valid, *i.e.*, was lawfully entered into.

Accordingly, the Board's arguments on pages 24 and 25 of its brief and its citations from the Senate Committee Reports on page 26 of its brief are entirely immaterial to the determination of the issues in the present case. The excerpt from the Senate's Report refers to "discrimination" in violation of Section 8(3) and indicates merely the Congressional intent to permit no exception to the prohibition against discharge under 8(3), except by virtue of a closed-shop contract or variant thereof. It is quite conceivable that Congress should specifically limit possible exceptions to the prohibition against discrimination; the act of discharge or demotion dealt with under Section 8(3) entails consequences of a most extreme and drastic nature. Congress has not, however, prescribed or evidenced any intent to prescribe the same rigid limitations on possible exceptions to Section 8(1) of the Act dealing with employer activities far less drastic than discharge. In the present case we are concerned with possible, and inherently necessary exceptions to the broad and very general language of Section 8(1), not to the narrow and very limited language of Section 8(3).

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[11] The Board made no finding that the confused few hours layoff of Ramsey was discrimination in violation of Section 8(3) of the Act.

F. *Respondents' Contentions Would Not Foreclose Employees From Effecting A Change of Representatives At The Expiration Of The Contract.*

The Board's final argument—that under the Unions' interpretation of the Act employees would be forever foreclosed from selecting or designating a different representative—must collapse upon examination of what Congress has specifically authorized in the statute and in the light of practical everyday experience. Congress expressly authorized a full closed-shop contract under which the greatest possible amount of coercion is permitted to enable an exclusive representative to force employees to retain membership even against their own desires. Congress would not have granted this power if it considered that, under no circumstances, was employees' freedom of choice to be interfered with, or had it imagined that thereunder employees would be forever foreclosed from changing representatives.

Further, actual experience respecting the ability of employees to change representatives, even under the extreme of a closed-shop contract, indicates quite clearly that employees would not be forever foreclosed from choosing new representatives at the end of the contract. The Board certainly is best qualified to appreciate that fact, for every day it receives numerous petitions from labor organizations alleging that a question of representation has arisen among employees covered by closed-shop contracts with rival labor organizations, which contracts are about to expire. And every day the Labor Board holds elections upon such petitions, and in a large percentage of cases the election results in favor of the petitioning organization.

G. *The Decisions Relied On By The Board Are Entirely Distinguishable.*

The decisions of this Court in the *Machinists'* case, supra, 311 U. S. 72, and the *Waterman Steamship Co.* case (*Na-*

tional Labor Relations Board v. *Waterman Steamship Company*, 309 U. S. 206) (strongly relied upon by the Board) are entirely distinguishable. In the *Machinists'* case the employer's activities operated to interfere with the exercise of free choice *prior* to the execution of any collective bargaining contract, and the employer's activities there found to be illegal were not engaged in during the existence of a lawful collective bargaining contract or during the terms of individual commitments, or at the request of the exclusive collective bargaining representatives. Further, in the present case there is no history of union hostility on the part of the employer, such as existed in the *Machinists'* case.

In the *Waterman* case it appeared that the acts of assistance, although engaged in during the existence of a contract, were not engaged in at the request of the exclusive representative, but on the employer's own initiative and clearly because of a pronounced C.I.O. antipathy. Further, the *Waterman* case involved discrimination by discharge, prohibited under Section 8(3), while here the assistance did not involve any discharges in violation of Section 8(3). Finally, in the *Waterman* case we do not have the circumstances here present—that 95% of the employees signed individual authorization cards which were still effective at the time of the illegal discharges.

H. *Final Considerations.*

Our essential thesis is that the freedoms granted to employees by Section 7 of the Act, no matter how unqualified or absolute they may be up to the point of an exclusive bargaining relationship and contract, are necessarily qualified after such an agreement is reached. Contracts, by definition, constitute a voluntary self-imposed restriction upon freedoms. And surely, those freedoms are not to be blindly asserted as inviolable and ultimate rights, at the expense of rendering the entire scheme of the Act unworkable and its fundamental purposes unrealizable.

Throughout this argument we have emphasized the poin that the Board's attempt too rigidly and technically t construe Section 8(1)—its making a fetish of the litera language of 8(1)—results in flouting and confounding th essential objective of the Act—stabilized and peaceful in dustrial relations. The absurdity of the Board's approac is readily demonstrable when viewed against our curren war situation. If stability in labor relations be desirabl under normal conditions—and no one will gainsay tha it is—how much more so when maximum, continuous an uninterrupted production is probably crucial to a success ful prosection of the war. Now, more than ever, can th value and benefits of the National Labor Relations Ac be appreciated. Yet, the Board seeks a construction o that Act which must inevitably undermine its essentia purpose.

It is a matter of common knowledge, of which thi Court may take judicial notice, that all branches of organ ized labor have undertaken, through agreement, to avoi strikes and other disruptions of production. Responsibl leaders of labor groups, conscious of their patriotic an social obligations, have pledged themselves and their or ganizations to this end. Similarly, recognized spokesmen for industry have, by agreement, pledged employers t a course of conduct that will preclude industrial stoppages

These agreements, however, no matter how sincerely in tentioned or how efficiently administered, do not and canno preclude some dissident groups among the millions of or ganized workers from engaging in unauthorized activitie that will stop production. Inevitably, unions and thei leaders will be compelled to seek the assistance of employ ers with whom they have labor agreements in order t protect contractual relationships against "wildcat" activi ties of such dissident groups, thereby effectuating thei national no-strike agreements. Yet such conduct, reason

able and even vitally necessary though it be, would under the Board's contentions constitute unlawful employer action.

It cannot be seriously argued that that kind of employer cooperation with a union request for peaceful relations is *lawful only where* there is an existing closed-shop agreement. The fact remains that, regardless of the wisdom or ethics of the closed shop, many of the leading producing corporations of the country are unalterably opposed to it and have refused, and will continue to refuse, to grant a closed shop. Congress could not constitutionally impose a closed-shop agreement on any employer. The President of the United States, in the course of the recent coal strike, stated that the Government of the United States would not compel a closed-shop agreement. Nevertheless, reduced to essential realistic terms, the Board's contentions result in the extremely narrow alternative of either the closed shop or industrial instability even though there be an existing and satisfactory collective bargaining relationship and agreement. Plainly, no process of reasoning or statutory construction should be permitted to yield a result so sharply antagonistic to the clear purposes and objectives of the Act.

IV.

The existence of the 771 valid and unrevoked individual authorizations validates the April contract and makes immaterial the "assistance".

A final argument in support of the validity of the April and May, 1937, closed-shop contracts (and, consequently, the discharges thereunder) is this: The Board in its briefs, both here and before the court below, has overlooked, and in its decision has inadequately discussed, the significance of the fact that 771 of 809 total eligible employees of the Electric Vacuum Cleaner Company signed powers of attor-

ney conferring upon the American Federation of Labor "full power and authority to act" on all matters respecting wages, hours and employment conditions during the term of the authorizations. Admittedly, these powers of attorney were entered into volutarily, without employer coercion, and represented the free will of each employee. The authorizations did not expire until June of 1937. No employee had revoked or had attempted to revoke an authorization in the manner prescribed therein or in any other manner. The commitments were in full force and effect during the period that the alleged "assistance" occurred. Cards had twice been submitted to the Company for inspection; the Company was aware that such cards were in existence and were effective until June of 1937.

Certainly, as between the Union and the individual employees, the cards were valid and binding contracts. The consideration to the employees was that the Union secure for them a beneficial bargaining contract. This was done, and that contract likewise was in existence. The Board does not question the legality or the reasonableness of the individual authorizations, and it does not assert that such authorizations were contrary to any policy of the Act, as indeed they are not, if any stability or security in employer-employee relationships is to obtain. The court below specifically held that these authorizations were valid in every respect (R. 372):

> "These authorizations, running for a term of one year and thereafter, could be withdrawn upon thirty days written notice; but the record presents no such withdrawal. The term of one year was reasonable and the authorizations were in every respect legal. Signing the authorizations entitled the men to the benefits of union membership, including the benefits of the contract between the respondent and the affiliated unions,

and they in turn were bound thereby during the term of the authorizations."

By virtue of these powers of attorney the American Federation of Labor was assured, if not guaranteed, that it would represent an overwhelming majority of the employees for the entire year. Nothing that the employer could do could destroy this assurance or could destroy the contractual right which the American Federation of Labor had to represent these employees. Nothing that the Company could do could operate to assist the American Federation of Labor to obtain or maintain its majority, the majority necessarily continuing during the terms of the individual commitments. Solicitation by the Company of those who had signed these powers of attorney could amount to no more than a request by the Company that the employees carry out what they had already agreed to under the individual authorizations. Consequently, such solicitation or such "assistance" would be entirely immaterial and could not affect the validity of the agreements of either April 3rd or May 20th. There is no showing in the record that the employer solicited any except, perhaps, one of the 38 employees who had not signed the individual authorization; and, in any event, even if all 38 of the employees who had not signed the individual authorizations had been solicited, this would represent but 5% of the total number of employees. Surely, the Board would not extend its assistance-incapacitating theory to the extent of denying 95% of the employees the right to enter into a closed-shop contract because of assistance even to 5%, let alone to 1/1000 of 1%, the greatest percent that the record can sustain as having received any "assistance".

In entering into the agreements of April 3rd or May 20th the Company acted, as it had a right to act, upon the commitments which had been made by the individual employees

signing the powers of attorney. It assumed, as it had a right to assume, that the American Federation of Labor then represented an overwhelming majority of its employees, and the American Federation of Labor did in fact represent such majority by virtue of the existing and unrevoked authorizations. As the representative of a minimum of 95% of the Company's employees, the American Federation of Labor had a right to enter into the closed-shop contracts of April and May. At the time the April 3rd contract (upon which the May 20th contract was predicated) was entered into, no other labor organization had informed or notified the employer that it claimed a majority, no petition under Section 9 of the Act had been filed, and accordingly no question of representation then existed which might preclude entering into such contract. Such contracts were valid, and accordingly the refusals to employ thereunder must be upheld.

The reasons which have been set forth in Argument III, *supra*, as to why employees should be required to live up to their agreements apply with equal force in respect to the individual authorizations. No possible purpose of the Act could be served by permitting willful disregard of commitments of this nature when they have been freely entered into with full understanding of their consequences. By individually agreeing to designate a certain representative as exclusive bargaining representative for a definite and reasonable period of time, a period of stable relationships, free from inter-union disruption, had been assured.[12] Freedom to choose *a representative* does not involve the freedom *to change such choice* at will in utter disregard of legitimate contractual obligations, in utter disregard

[12] Indeed, the question may well be raised as to whether at least 18 of the employees who had signed the authorizations, but whom the Board has found to have been discriminatorily discharged under the April 3rd contract, may not be estopped from asserting discrimination in view of the employer's reliance on their unrevoked commitments.

of commitments which have affected the status of third parties, and in utter disregard of the disrupting effect which such change of choice may have upon peaceful industrial relationships achieved through the process of bona fide collective bargaining. The existence of these cards alone, regardless of any term of any collective bargaining agreement which may have been entered into between the employer and the American Federation of Labor, justifies and legalizes the so-called "acts of assistance" which the Board has found to violate the Act, and certainly validates the closed-shop contracts of April 3rd and May 20th.

Conclusion.

It is respectfully submitted that the decree of the court below should be sustained.

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
736 Bowen Building,
Washington, D. C.,
Counsel for Union Respondents.